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No. 455

In the Supreme Court of the United States

OCTOBER TERM, 1962

PROVIDENT FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

v.

FEDERAL HOME LOAN BANK BOARD AND QUAKER CITY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL HOME LOAN BANK BOARD IN OPPOSITION

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 556

BRIDGEPORT FEDERAL SAVINGS AND LOAN ASSOCIATION, PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD AND QUAKER CITY FEDERAL SAVINGS AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL HOME LOAN BANK BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 12a–20a,[1] Pet. App. 24–32) is reported at 199 F. Supp. 410. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 32–39) is reported at 307 F. 2d 580.

[1] Record references are to the petitioner's Appendix in the court of appeals, which has been filed with the Clerk of this Court.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1962 (Pet. App. 32, 39). The petition for a writ of certiorari was filed on October 24, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Home Loan Bank Board is required by statute or the Constitution, in considering an application by a federal savings and loan association for permission to establish a branch office, to make its determination only after a hearing conforming with the procedural requirements of the Administrative Procedure Act.

2. Whether such a determination by the Board constitutes agency action committed by law to agency discretion and is therefore not subject to judicial review.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 13–18.

STATEMENT

This suit was brought by petitioner, the Bridgeport Federal Savings and Loan Association, against the Federal Home Loan Bank Board and the Quaker City Federal Savings and Loan Association for declaratory and injunctive relief against a resolution of the Board authorizing Quaker City to establish a branch office in King of Prussia, Pennsylvania (R. 2a–7a).

Section 5(a) of the Home Owners' Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. 1464(a)

(App., *infra*, p. 16), declares that, "[i]n order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes," the Federal Home Loan Bank Board "is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." Section 5(e) (App., *infra*, p. 18) adds that "[n]o charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions." While the Act does not give the Board explicit authority to permit the federal savings and loan associations thus created to establish branch offices, it is well settled that such authority is implicitly granted by the Act.[2] The Board has accordingly promulgated

[2] See *North Arlington Nat. Bank* v. *Kearny Fed. Sav. & Loan Ass'n*, 187 F. 2d 564 (C.A. 3), certiorari denied, 342 U.S. 816; *First Nat. Bank of McKeesport* v. *First Fed. Sav. & Loan Ass'n*, 225 F. 2d 33 (C.A.D.C.); *Springfield Inst. for Savings* v. *Worcester Fed. Sav. & Loan Ass'n*, 329 Mass. 184, 107 N.E. 2d 315, certiorari denied, 344 U.S. 884. The power of the Board to authorize branch offices is not here challenged.

regulations relating to the establishment and maintenance of branch offices.[3]

Respondent Quaker City is a federal association established under the Act, with its principal office in Philadelphia (R. 12a). On February 4, 1959, it filed an application with the Board to establish a branch office at King of Prussia in Upper Merion Township, Montgomery County, Pennsylvania (*ibid.*). Petitioner, a federal savings and loan association having its principal office at Bridgeport, Pennsylvania, and two other such associations protested the application, and the Board set the matter down for hearing on June 20, 1960 (R. 3a).[4]

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[3] 12 C.F.R. 545.14 provides in pertinent part:

> § 545.14 *Branch office.* No Federal association may establish or maintain a branch office without the prior written approval of the Board. Each application by a Federal association for permission to establish or maintain a branch office shall state the need for such branch office; the functions to be performed; the personnel and office facilities to be provided; the estimated annual volume of business, income, and expenses of such branch office; and shall be accompanied by a proposed annual budget of such association. Any business of a Federal association, except the approval of loans, may be transacted at a branch office, as authorized by its board of directors. * * *

[4] The hearing was to be that provided by the Board's regulations, which state in pertinent part (12 C.F.R. 542.2):

> § 542.2 *Hearings.* Any person who has made an application or petition to the Board pursuant to any provision of * * * [Part] 545 * * * of this subchapter may request a hearing thereon, provided such application or petition has been denied or disapproved by the Board. At any time after the filing of any such application or petition and before consideration thereof by the Board, any interested person may request a hearing upon such application or petition. The Board may order a hearing in connection

On June 8, 1960, before the hearing, petitioner's attorney requested, in writing, that the Board issue two subpoenas *duces tecum* directed to certain records of Quaker City and of the Township of Upper Merion (R. 3a). The Board denied this request and a similar one made during the hearing on the ground that it had no subpoena power (R. 3a–4a). Another request was made by petitioner to the Board, both before and during the hearing, that any reports, surveys or correspondence in the files of the Board pertaining to Quaker City's application for a branch office be made a part of the record in the case and subject to examination by all parties in interest. This request was denied by the Board on the ground that the records in question were internal office communications not subject to public inspection (R. 4a).

The hearing took place over a period of three days in June 1960, in the course of which testimony was taken on behalf of the applicant and the three protestants. Briefs and reply briefs were then filed (R. 3a). Subsequently, on March 7, 1961, the Board issued a decision in the form of a resolution approving Quaker City's application to establish the branch office, concluding (R. 8a–9a)

> that a necessity exists for a branch office at, or in the immediate vicinity of 149 South Gulph Road, King of Prussia, Upper Merion Township, Montgomery County, Pennsylvania, there

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with the consideration of any matter arising under any provision of the rules and regulations in this subchapter, whether or not any request therefor has been made by any person. The Board may deny any request for, or dispense with, any hearing for which this section provides when, in its judgment, no need therefor exists.

> is a reasonable probability of its usefulness and success, and said branch office can be established at such locality without undue injury to properly conducted existing local thrift and home-financing institutions * * *.

Petitioner then brought this suit in district court, alleging (1) that the Board's failure to issue subpoenas *duces tecum*, to make available relevant reports, surveys and correspondence and to make detailed findings of fact violated the Administrative Procedure Act[5] and the Due Process Clause of the Fifth Amendment; (2) that there was no record support for the Board's findings of necessity for the branch office, probability of its usefulness and success, or absence of undue injury to other financial institutions; and (3) that the Board erred in failing to find that the establishment of the branch would be destructively competitive to existing institutions and contrary to the public interest (R. 5a–7a). Petitioner sought a declaration that the Board's decision was null and void and an injunction against either the Board's or Quaker City's putting the decision into effect (R. 7a).

The Board and Quaker City filed motions to dismiss on the grounds that the court lacked jurisdiction

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[5] Section 5 of that Act, 60 Stat. 239, 5 U.S.C. 1004, where applicable, provides that a hearing complying with Sections 7 and 8 must be held. Section 7(b), (d), 60 Stat. 241, 5 U.S.C. 1006(b), (d), prescribes, *inter alia*, that hearing officers are to have the power to issue subpoenas, and that the papers filed in the proceeding are to constitute the exclusive record for decision. Section 8(b), 60 Stat. 242, 5 U.S.C. 1007(b), directs that agency decisions include findings of fact as well as conclusions of law (App., *infra*, pp. 13–15).

over the subject matter and that the complaint failed to state a claim on which relief could be granted (R. 10a, 11a). The district court granted the motions and dismissed the complaints on the latter ground, holding that there was no constitutional or statutory requirement of an Administrative Procedure Act type of hearing under the circumstances (Pet. App. 25–28) and that the Board's action was not subject to judicial review (Pet. App. 29–32). The court of appeals affirmed, holding that neither the Constitution nor the Home Owners Loan Act required the Board to hold a hearing complying with the Administrative Procedure Act (Pet. App. 33–39). The court did not review the merits of the Board's decision, stating that the Board "has been granted a broad discretion by the Congress in its disposition of applications of the type involved" (Pet. App. 39).

ARGUMENT

Both courts below were clearly correct in ruling that petitioner had no constitutional or statutory right to a hearing with all the procedural trappings prescribed by the Administrative Procedure Act, and in refusing to review the merits of the Federal Home Loan Bank Board's exercise of its broad discretion to approve branch-office applications. Their decisions were in full accord with prior decisions of this and other courts, and there is no occasion for further review.

1. The hearing procedures of the Administrative Procedure Act [6] are, by the terms of the Act, applicable only in cases of "adjudication required by statute to

[6] See note 5, *supra*.

be determined on the record after opportunity for an agency hearing." Administrative Procedure Act, Section 5, 60 Stat. 239, 5 U.S.C. 1004 (App., *infra*, p. 13). In addition, this Court indicated in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50, that the Administrative Procedure Act procedures would be applicable to "hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity."[7] The Home Owners' Loan Act contains no provision requiring the Board to hold a hearing in passing on an application to establish a branch office, nor does petitioner argue that the requirement of an Administrative Procedure Act hearing is necessary to save the Home Owners' Loan Act from unconstitutionality. Nevertheless, petitioner asserts the right to an Administrative Procedure Act hearing as a matter of due process of law on the novel theory that petitioner has a "property right" in being protected against harmful competition, which in turn (so the argument runs) imposes an Administrative Procedure Act hearing requirement in order to satisfy the Due Process Clause of the Fifth Amendment (Pet. 5–10).

It is well settled, of course, that petitioner has no constitutional or common-law right to be free from competitive injury, see *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137–140, nor does petitioner contend that the "property right" it claims here has such origins. Rather, petitioner argues that Section 5(e) of the Home Owners' Loan Act (App., *infra*,

[7] We do not read such decisions as *Riss & Co.* v. *United States*, 341 U.S. 907, and *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33 (cited by petitioner, Pet. 7–9), as having expanded the constitutional reach of that holding.

p. 18), by providing that "[n]o charter shall be granted" to a savings and loan institution unless (among other things) "the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions," was intended by Congress to confer upon petitioner a "property right" to be free of harmful competition (Pet. 5–10). We submit that there is no basis whatever for a contention that Section 5(e) had either such a purpose or such an effect.[8]

It is evident that the quoted language was not designed to bestow private property rights. The considerations enunciated by Section 5(e), including the avoidance of "undue injury" to other institutions, are simply general criteria to guide the judgment of the Board in the exercise of its powers. See *Federal Home Loan Bank Board* v. *Rowe*, 284 F. 2d 274, 275 (C.A. D.C.). The distinction is precisely the same one that this Court had in mind when it held, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 473–476, that while "economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license," such injury would properly be taken into account by the Commission in its general appraisal of the public interest.

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[8] Indeed, it has been held in *First Nat. Bank of McKeesport* v. *First Fed. Sav. & Loan Ass'n*, 225 F. 2d 33 (C.A.D.C.), that the Section 5(e) criteria do not apply at all in branch application cases. In this brief, we assume for the sake of argument that they do apply, and the Board in fact articulated its decision in terms of them (see pp. 5–6, *supra*).

Furthermore, the absence of an intent to create a "property right" requiring a hearing is demonstrated by the fact that no hearing is provided for by the statute. And this conclusion is confirmed by the general congressional practice of omitting compulsory hearing provisions from legislation dealing with banking. For years the Comptroller of the Currency, under the National Bank Act (R.S. 5168, R.S. 5155, as amended, 12 U.S.C. 26, 36), the Federal Reserve Board, under the Federal Reserve Act (38 Stat. 259, as amended, 12 U.S.C. 321, 322) and the Board, under the Act here involved, and also under Section 4 of the Federal Home Loan Bank Act, as amended (47 Stat. 726, as amended, 12 U.S.C. 1424), have passed on membership, charter, and branch applications free of any statutory direction to hold hearings.[9] See also Sen. Doc. No. 8, 77th Cong., 1st Sess. 143; 1 Davis, *Administrative Law*, Section 248.

Finally, contrary to petitioner's contention (Pet. 13–14), the Board was not bound, simply because it

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[9] In the exceptional situations in which it has deemed a hearing appropriate in the banking field, Congress has not been equivocal. Thus, Section 5(d)(1) of the Home Owners' Loan Act, 48 Stat. 132, as amended, 12 U.S.C. 1464(d)(1) (App., *infra*, pp. 16–17), which provides for supervisory enforcement proceedings by the Board against savings and loan institutions, contains an explicit requirement that hearings be held in compliance with the Administrative Procedure Act.

Petitioner notes that Section 5(d)(1) grants the Board the power to issue subpoenas and subpoenas *duces tecum* and urges that this power be "construed" as applying to the licensing, as well as the enforcement, functions of the Board (Pet. 12). It is plain from the context of this provision, however, that the subpoena power conferred is to be co-extensive only with the hearing requirement, imposed in the case of enforcement proceedings.

provided a hearing, to accord one with all of the procedural accoutrements of the Administrative Procedure Act. It was entitled to hold a limited hearing for the purpose of acquiring information sufficient for the exercise of its judgment. See *Ludecke* v. *Watkins*, 335 U.S. 160, 171–172; *Norwegian Nitrogen Co.* v. *U.S.*, 288 U.S. 294; *Airline Pilots Assn* v. *Civil Aeronautics Board*, 215 F. 2d 122 (C.A. 2). The hearing procedures provided by the Board were adapted to this purpose,[10] and petitioner makes no contention that the Board failed in any way to comply with its own procedures in the present case.

2. Petitioner's contention that the courts below had jurisdiction to review the merits of the Board's decision to permit Quaker City to establish a branch office (Pet. 15–23) is also without substance, as both courts below recognized (Pet. App. 29–32, 39). Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 (App., *infra*, pp. 15–16), provides for judicial review of agency action "[e]xcept so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discre-

[10] The Board's procedures are particularly geared to dealing with the difficult problems posed in the supervision of banking institutions. For instance, in view of the nature of banking operations, "the exercise of supervisory powers over banks has traditionally been attended by a secrecy antithetical to the publicity which marks most regulatory activities." Monograph of the Attorney General's Committee on Administrative Procedure, Part 13, Sen. Doc. No. 186, 76th Cong., 3d Sess., p. 43. Thus, the Board's regulations forbid the disclosure of certain records and documents "involving delicate and sensitive matters relating to the condition and affairs of financial institutions * * *." 12 C.F.R. 505.12.

tion." While the Home Owners' Loan Act does not explicitly preclude review of the Board's decisions in passing upon branch applications (making as it does no reference to branches [11]), every court that has examined the question has concluded that the Act does, by clear implication, commit such decisions to agency discretion. *Federal Home Loan Bank Board* v. *Rowe*, 284 F. 2d 274 (C.A.D.C.); *First Nat. Bank of McKeesport* v. *First Federal Sav. & L. Ass'n*, 225 F. 2d 33 (C.A.D.C.); *North Arlington Nat. Bank* v. *Kearny Fed. Sav. & L. Ass'n*, 187 F. 2d 564 (C.A. 3), certiorari denied, 342 U.S. 816.[12] See also *Board of Governors of Federal Reserve System* v. *Agnew*, 329 U.S. 441, 450 (concurring opinion of Rutledge, J.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

ALAN S. ROSENTHAL,
MARK R. JOELSON,
Attorneys.

NOVEMBER 1962.

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[11] See p. 3, *supra*.

[12] The Texas case cited by petitioner, *Brazosport Sav. & Loan Ass'n* v. *American Sav. & Loan Ass'n*, 342 S.W. 2d 747, involved institutions established pursuant to state law and has no application here.

APPENDIX

The Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001 *et seq.*, provides in pertinent part:

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

* * * * *

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(b) *Hearing Powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) *Evidence.*—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) *Record.*—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance

with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) *Submittals and Decisions.*—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * *

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * *

Section 5 of the Home Owners' Loan Act of 1933, 48 Stat. 128, as amended by the Housing Act of 1954, 68 Stat. 590, 634, 12 U.S.C. 1464, provides in pertinent part:

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

SEC. 5. (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

* * * * *

(d)(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in subsection (d)(2) hereof, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in

any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal resolution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representative in Charge, a conservator or a receiver shall be exclusively as provided in subsection (d)(2) hereof. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. * * *

* * * * *

(e) No charter shall be granted except to persons of good character and responsibility, nor unless in the judgment of the Board a necessity exists for such an institution in the community to be served, nor unless there is a reasonable probability of its usefulness and success, nor unless the same can be established without undue injury to properly conducted existing local thrift and home-financing institutions.

* * * * * *

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